FILED

94 773 OCT 27 1994

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1994

Q-1 MOTOR EXPRESS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 27, 1994

QUESTION PRESENTED FOR REVIEW

Petitioner, Q-1 Motor Express, Inc., respectfully requests that a writ of certiorari issue to review the following questions previously presented to the National Labor Relations Board and United States Court of Appeals for the Seventh Circuit:

(a) Has the United States Court of Appeals for the Seventh Circuit sanctioned a departure by the National Labor Relations Board from the accepted and usual course of administrative adjudication by granting enforcement of an Order from the National Labor Relations Board that is based upon credibility determinations of an administrative law judge who was biased or gave the appearance of partiality?

(b) Does the decision of the United States Court of Appeals for the Seventh Circuit to enforce the bargaining order of the National Labor Relations Board conflict with decisions of this Court because the National Labor Relations Board has not shown either that Teamsters Local Union No. 89 represented a majority of Petitioner's drivers or that Petitioner's alleged violations of law would interfere with the holding of a fair election?

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[1] Donald Ray Denham, Dan W. Stevens and Anthony Lupo were individuals originally named as parties, and General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO, was an entity originally named as a party to this case when it was before the National Labor Relations Board (the "Board"). The Board was substituted as the proper party hereto on March 26, 1993, when it filed its Application for Enforcement of Order with the United States Court of Appeals for the Seventh Circuit.

Q-1 Motor Express, Inc. is an independent corporation that has no subsidiaries that are not wholly owned.

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PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

This Petition seeks a writ of certiorari with respect to a published final Order of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") issued on May 25, 1994 and reprinted as Appendix A. *Appendix* at 1a. The Order granted the application of Respondent, National Labor Relations Board ("Board"), for enforcement of its order issued against Petitioner, Q-1 Motor Express, Inc. ("Q-1"), on September 30, 1992, reported at 308 NLRB No. 185 and reprinted as Appendix C. *Appendix* at 21a.

II.

JURISDICTION

The Seventh Circuit denied Q-1's petition for rehearing on July 29, 1994. Pursuant to Sup. Ct. Rule 13.4, the time for filing a petition for writ of certiorari runs from the date of the denial of a petition for rehearing. Accordingly, this Petition was timely filed within 90 days of the Seventh Circuit's Order denying Q-1's petition for rehearing. The jurisdiction of this Honorable Court to review the Board's Order on Petition for Writ of Certiorari rests upon 28 U.S.C. § 1254 (1992), as the Petition seeks the review of a judgment from a United States Court of Appeals.

III.

STATUTES INVOLVED

The primary statutory provisions relevant to this case are 29 U.S.C. §§ 157 and 160(a), which are reprinted verbatim as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other

> means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

29 U.S.C. § 160(a). Other relevant statutory provisions are 29 U.S.C. §§ 158(a)(1), (3) and (5) and 29 U.S.C. § 160(j).

IV.

STATEMENT OF THE CASE

A.

Summary Of The Facts

Q-1 is an Indiana corporation which, at the time the incidents which gave rise to this suit arose, had its principal office and terminal located in Clarksville, Indiana. Q-1 is a motor carrier engaged in the business of providing regulated, for-hire transportation services in interstate commerce.

In May, 1991, Teamsters Local Union No. 89 ("Local 89") began an organizational drive at Q-1's Clarksville facility. On May 17, 1991, Q-1's President, James E. Schroering, Jr. ("Schroering"), spoke with Q-1 driver Donald Denham ("Denham"). Denham claims that Schroering approached him at a fuel island and told him that he understood Denham was handing out union authorization cards, that he was not going to have any union representative telling

him how to run his business, that he had talked to his attorney and that he could shut down the business and re-open it in 72 hours with new employees.[2]

On May 19, 1991, Schroering held one of Q-1's periodic drivers meetings. At this meeting and in accordance with an announcement made several weeks earlier, Schroering told Q-1's drivers that, as a result of improved fuel economy, the drivers who had been with Q-1 for at least one year would receive a 1¢ per mile pay increase. Schroering was then asked whether it was possible to change the employment status of Q-1 driver Lupo from a casual to full-time driver. Schroering stated that he could not simply agree to the change, but would look into it.

On May 24, 1991, Q-1 driver Dan Stevens ("Stevens") claims that Schroering told him that he thought he "had better friends" amongst Q-1's drivers, that he knew everyone who had signed a union card, and that he would fire everybody who signed a card if necessary to keep the union out.[3]

Q-1 claims that, on May 28, 1991, it discharged Denham in accordance with its progressive discipline procedure. Prior to his discharge, Q-1 claims that Denham received an oral warning for truck log violations, a second oral warning for drifting off the road, a written warning for truck log violations, a second written warning for a "chargeable accident", and a three-day suspension for truck log violations. Denham was discharged for failing to record a ticket he received for a moving violation in his driver's log and for failing

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[2] Denham's testimony regarding this incident was credited by administrative law judge Walter Maloney ("ALJ Maloney"), who initially heard this case on behalf of the Board. Q-1 driver Anthony Lupo ("Lupo") allegedly overheard some of the statements Denham now attributes to Schroering. His testimony was also credited by ALJ Maloney. Schroering denied making any of the referenced statements to Denham.

[3] Stevens' testimony in this regard was also credited by ALJ Maloney. Schroering denied making any of these statements to Stevens.

to call in or report for work for nineteen hours during May 24 - 25, 1991.[4]

Q-1 claims that, on May 30, 1991, it discharged Stevens in accordance with its progressive discipline procedure. Prior to his discharge, Q-1 claims that Stevens received a written warning for his involvement in a preventable accident and his dishonesty in reporting the accident to Q-1, a second written warning for damaging Q-1's equipment, and a three day suspension for falsifying his worker's compensation claim report. Stevens was discharged for failing to report for work or make himself available for dispatch on May 28, 1991.[5]

Q-1 claims that, on June 21, 1991, it discharged casual employee Lupo. Prior to his discharge, Q-1 claims that Lupo had been denied a load on two separate occasions after calling in and admitting to having been involved in all-night drinking binges and that he had received a warning letter from Q-1 for failing to turn in paperwork and for refusing to make himself available for dispatch. Lupo was discharged for failing to report for work between June 17-20, 1991.[6]

By letter dated July 18, 1991, Local 89 demanded recognition as the exclusive bargaining representative of Q-1's Clarksville drivers. As of that date, there were 15 employees at Q-1's Clarksville facility. However, only seven authorization cards were submitted by Local 89 in support of its recognition demand. An eighth alleged card, that of Q-1 driver Homer Longoria, was claimed to exist, but was never introduced into evidence or otherwise accounted for by Local 89. Of the seven union authorization cards submitted for consideration, three were from

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[4] ALJ Maloney discredited this asserted reason for Denham's discharge.

[5] ALJ Maloney discredited this asserted reason for Stevens' discharge.

[6] ALJ Maloney discredited this asserted reason for Lupo's discharge.

Denham, Stevens[7] and Lupo, individuals previously discharged by Q-1. A fourth card was from Mark Suddeth, who did not work for Q-1 as a truck driver.[8]

On June 12, 1991, Denham, Stevens and Lupo and on July 18, 1991, Local 89 filed unfair labor practices charges with the Board (the "Charges"), alleging that Q-1 violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. §§ 158(a)(1), (3) and (5), by discriminating against Denham, Stevens and Lupo in order to discourage their membership in Local 89, and/or by discharging, threatening and coercing these drivers in an attempt to discourage such membership. A bargaining order and injunctive relief were sought as relief.

B.

The Administrative And Lower Court Proceedings

On August 14, 1991, an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (the "Amended Complaint") was issued by the Board based on the Charges. On August 23, 1991, Q-1 filed its Answer to the Amended Complaint, denying all material allegations contained therein.

Approximately 90 days before the scheduled hearing date before ALJ Maloney on the Charges, the Board brought an action in the United States District Court for the Southern District of Indiana seeking injunctive relief against Q-1 pending the final disposition of

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[7] Stevens' card was also unsigned.

[8] In the Amended Complaint, the General Counsel alleged that the unit appropriate for purposes of collective bargaining was "All employees of [Q-1] employed as truck drivers at or out of [Q-1's] Clarksville, Indiana terminal, but excluding all guards and supervisors as defined in the Act." (Emphasis added.) Q-1, in its Answer to the Amended Complaint, admitted that this bargaining unit description was correct. The bargaining unit was later stipulated at the hearing to include drivers and mechanics.

the Charges, pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j). A three-day hearing was held thereafter on the Board's injunction petition, where all of the principal witnesses who would later appear before ALJ Maloney testified. United States District Court Judge Sarah Barker ("Judge Barker"), after the hearing on the Charges held by ALJ Maloney but before the issuance of ALJ Maloney's decision, then issued her decision denying the Board's petition. In so ruling, Judge Barker credited the testimony of Q-1's witnesses over that of the Board's witnesses, found that Q-1's witnesses were more credible than the Board's witnesses, and found that the testimony of the Board's witnesses was "scripted" and "less than candid." Judge Barker's decision is reprinted verbatim in the *Appendix* at 75a - 95a.

A hearing on the Amended Complaint was held on December 2 - 4, 1991 before ALJ Maloney. In his March 11, 1992 decision, ALJ Maloney found that Q-1 had violated Sections 8(a)(1), (3) and (5) of the Act by committing all of the acts alleged in the Amended Complaint, as well as other seven acts not alleged in the Amended Complaint. ALJ Maloney further found that Local 89 represented a majority of Q-1's employees in an appropriate bargaining unit, that Q-1's violations of the Act were so pervasive as to make a fair election unlikely and that a bargaining order was therefore appropriate. ALJ Maloney recommended that Q-1 cease and desist from the violations found, reinstate and make whole Denham, Stevens and Lupo, and bargain in good faith with Local 89 upon request.

By Decision and Order dated September 30, 1992, the Board dismissed the seven Section 8(a)(1) violations found by ALJ Maloney but not alleged in the Amended Complaint, as well as the Section 8(a)(5) violation found by ALJ Maloney, yet otherwise adopted ALJ Maloney's other rulings, findings and conclusions, including those regarding witness credibility.

On May 25, 1994, a panel of the Seventh Circuit,[9] Circuit Judges Lay and Rovenor with Judge Coffey dissenting, issued its decision in this case. The Seventh Circuit granted the Board's application for enforcement of its Order and denied Q-1's cross-application for review. The panel majority found that there was substantial evidence supporting the Board's Sections 8(a)(1) and 8(a)(3) determinations, that Q-1 presented no evidence that would lead it to disturb the Board's finding that Local 89 had majority status as of May 19, 1991, and that there was no abuse of discretion in the Board's determination that a bargaining order was appropriate to remedy Q-1's alleged violations of the Act. By Order dated July 29, 1994, the Seventh Circuit denied Q-1's petition for rehearing and suggestion for rehearing.

V.

REASONS FOR GRANTING THE WRIT

A.

The Seventh Circuit's Ruling Sanctions A Departure By The Board From The Accepted And Usual Course Of Administrative Adjudication

Enforcement of the Board's Order would sanction a departure from the accepted and usual course of administrative adjudication. "Justice must satisfy the appearance of justice" and "administrative agencies, as well as administrative law judges, must avoid even the appearance of bias or impartiality." *In Re Murchison*, 349 U.S. 133, 136 (1955). In this case there are irreconcilable differences between the credibility findings of Judge Barker and ALJ Maloney. ALJ Maloney reached the exact opposite conclusion regarding the credibility of the parties' witnesses as did Judge Barker after hearing virtually the same testimony from the same principal witnesses. Judge Barker found that Q-1's witnesses were more credible than

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[9] The Seventh Circuit had appellate jurisdiction in this case by virtue of 29 U.S.C. §§ 160(e) and (f).

the Board's witnesses and that the testimony of the Board's witnesses appeared to have "scripted" and was less than candid. ALJ Maloney, on the other hand and without giving any explanation as to why his credibility findings were directly opposed to those of Judge Barker, credited the testimony of the Board's witnesses over that of Q-1's witnesses. This unexplained inconsistency is especially troublesome in light of the fact that the hearing before Judge Barker occurred prior to the hearing before ALJ Maloney, when witnesses' memories and recollection of events were presumably clearer and more vivid.

Additionally, several findings made by ALJ Maloney strongly suggest that he was, in fact, biased against Q-1. For example, ALJ Maloney based his decision against Q-1 on seven violations of Section 8(a)(1) of the Act that the Board did not even allege in its Amended Complaint, and a violation of Section 8(a)(5) of the Act that the Board on review found could not have occurred. These facts alone strongly infer that ALJ Maloney was less than objective about this case. The fact that the Board was forced to affirmatively disavow and dismiss ALJ Maloney's findings, including findings that a conversation between Q-1 supervisors, with no employees present, and Q-1's consultation with its attorney prior to discharging Denham, somehow violated the Act, only provide additional and independent evidence of his bias against Q-1. In appearance, if not fact, these circumstances suggest that ALJ Maloney sought to manufacture additional charges against Q-1 by construing case evidence in a manner that was unfair to Q-1 and an inappropriate exercise of his administrative powers and duties.

The Board then compounded ALJ Maloney's inappropriate behavior by simply accepting his credibility findings without explaining or even acknowledging the known and contrary credibility findings of Judge Barker and without offering any rationale as to how it was able to "disavow" certain of ALJ Maloney's findings yet fully credit others subject to the same taint of bias.

In enforcing the Board's Order, the Seventh Circuit declined what it characterized as "Q-1's attempt to engage this Court in

renewed fact finding." Such a response simply allows the charade to continue, offers no guidance as to when and under what circumstances the biased findings of an administrative law judge can be challenged, and sanctions ALJ Maloney's obvious departure from the usual and accepted course of administrative adjudication. Given the Board's unwillingness or inability to establish uniform standards for the review of administrative decisions for bias and partiality, this Honorable Court must set such standards on the Board's behalf, or Q-1 and others similarly situated will be left with no viable means for reviewing and obtaining relief from such administrative malfeasance.

B.

The Seventh Circuit's Ruling
Conflicts With *Gissel Packing Co.*

Q-1 calls upon this Court to revisit its 1969 decision in *National Labor Relations Board v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). In *Gissel*, the Court observed that bargaining orders are appropriate remedies for unfair labor practices only in those rare and extraordinary cases where a union's majority status has been established and employer practices are found to be so extensive in terms of their past effect on election conditions and in their likelihood of reoccurrence that the possibility of ensuring a fair election by the use of traditional remedies is slight.

In this case, the Board's Order violates *Gissel,* as the majority status of Local 89 has never been established. In this regard, unambiguous union authorization cards, stating on their face that their signer authorizes the union to represent the employee for collective bargaining purposes, were never obtained from a majority of Q-1's employees. Only seven cards were proffered by the Board for Q-1's 15-driver unit. Even if the cards of Denham, Lupo, and Stevens are not subtracted from this total as being cards from individuals who were not Q-1 employees at the time in question, this does not change the fact that a finding of majority status, a pre-requisite under *Gissel* for the issuance of a bargaining order, has not

been established. The "eighth card" relied upon by the Board to meet its majority requirement was never seen by anyone at any time save the driver who claimed to have signed it.[10] This is not the case of a "misplaced card," as the Board contends. It is the case of a card whose existence enjoys no corroborating testimony. Never before has such a "phantom card" been allowed by the Board or the courts to decide the question of majority status. The ramifications of allowing such uncorroborated testimony to establish a card majority are obvious and do not meet the requirements nor the spirit of *Gissel*.

The Board's Order also violates *Gissel* in that no showing has been made that less extraordinary remedies will not prove sufficient to protect the Section 7 rights of Q-1's employees. Eight of the nine alleged Section 8(a)(1) violations not disavowed by the Board involve the same three drivers only and took place during a total of four exchanges during three days within a seven-day period in an approximately 75-day organizing campaign. All but two of these exchanges were private conversations, and at least seven had no chilling effect on their recipient, as Denham, Stevens and Lupo apparently continued their organizational efforts unabated. Additionally, only one employee from Q-1's original bargaining unit is still working at Q-1, and Q-1 no longer operates its Clarksville facility.

The above facts do not establish that a fair election could not be held at Q-1 or that employee sentiment would be better protected by a bargaining order than by the Board's more traditional remedies. Among other things, one cannot reasonably determine from the Board's Order (1) whether the Board gave due consideration to Q-1's employees' section 7 rights, one of the fundamental purposes of the Act, (2) why the Board concluded that other purposes must override the rights of Q-1's employees to choose their own bargaining representative, (3) why other remedies, less destructive

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[10] Reliance on this phantom "eighth card" to establish majority status is even more tenuous given the testimony of Longoria that he signed a card and gave it to fellow driver Howard Starcher to hold until he saw what was going to happen. Tr. 333.

to employees' rights, are not adequate, and (4) how the Board was able to disavow some of ALJ Maloney's findings yet determine, without comment, that such disavowals would necessarily have no effect on his decision to recommend the issuance of a bargaining order.[11]

Nothing is said in the Board's Order about any potential continuing effect of Q-1's alleged misconduct or whether Q-1's alleged misconduct or has undermined union support or whether Q-1's favorable labor relations history and its current management attitude decreases the likelihood of future misconduct. Nothing is said about the potential effectiveness of the Board's traditional remedies, such as a cease and desist order, or the posting of notices or the reinstatement of affected employees. Instead, the Board simply "laundry lists" the Section 8(a)(1) and (a)(3) findings of ALJ Maloney that it did not "disavow," and then concludes that the possibility of erasing the effects of such violations is "slight" and the holding of a fair election "unlikely." The Board's Order thus violates *Gissel* by failing to explain how or why it believes that Q-1's actions, over three years ago, would now interfere with the holding of a fair election or could not be remedied by less extraordinary means.

The Seventh Circuit glosses over this Board failure by positing its own views as to why Q-1's actions might weigh against the effectiveness of less drastic remedies. However, such dictum by the Seventh Circuit cannot remedy the Board's own failure to comply with its *Gissel* obligations. Since 1969, the Board has issued numerous conflicting decisions as to when a bargaining order should issue and when less draconian remedies are sufficient.[12] This

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[11] ALJ Maloney based his remedy, at least in part, on seven Section 8(a)(1) violations that were not alleged in the Amended Complaint and were later dismissed by the Board. There was no explanation of whether the remaining violations would nonetheless serve as a basis for a *Gissel* bargaining order.

[12] For example, in *Teksid Aluminum Foundry*, 311 No. 71 (1991), the Board found that an employer had violated Section 8(a)(1) of the Act by, among other things, involving itself in three instances of actual surveillance, five instances of prohibiting protected employee activities and numerous instances of coercive

Honorable Court should now set uniform standards that will protect the interests of Q-1's employees, and of other employees similarly situated, in being permitted to choose their own collective bargaining representatives before a *Gissel* bargaining order is issued by the Board.

VI.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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interrogation, threats of reprisal and discharge, plus several more instances of soliciting and promising to adjust grievances. In addition, the employer was found to have violated Section 8(a)(3) by, among other things, imposing six disciplinary warnings, four disciplinary suspensions and four disciplinary discharges. These violations of the Act were more numerous, more widespread, more prolonged and more egregious than any alleged to have been committed by Q-1. Yet the Board in *Teksid* acknowledged and approved the use of traditional remedies to rectify the employer's misconduct.